

No. 90-990

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

WEST TEXAS TRANSMISSION, L.P.,
Petitioner,

v.

ENRON CORP., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

REPLY MEMORANDUM

J. RUFUS WALLINGFORD
LAYNE E. KRUSE
RICHARD J. ZOOK
J. TYNAN KELLY
FULBRIGHT & JAWORSKI
1301 McKinney
Houston, Texas 77010-3095
(713) 651-5151

KEITH A. JONES *
FULBRIGHT & JAWORSKI
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

* Counsel of Record

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The FTC's argument boils down to the claim that the Constitution permits the government to do indirectly, in two steps, something that it is prohibited from doing directly in only one step. The Constitution contains no such convenient rule of expedience.

It is common ground that the FTC could not have settled litigation with Enron—litigation to which Valero was not a party—by entering into a consent decree that barred Valero from exercising its contractual right of first refusal over Enron's interest in the TransTexas pipeline. The FTC correctly, if only implicitly, concedes

that such a direct impairment of Valero's contractual right would run afoul of *Martin v. Wilks*, 109 S. Ct. 2180 (1989). FTC Br. in Opp. 10-11. Yet the FTC contends that it lawfully achieved precisely the same result through indirection—by first entering into a consent decree barring Enron from selling its interest in the Trans-Texas pipeline to anyone without prior approval; and by then using the power conferred upon itself by the consent decree to disapprove Valero's exercise of its right of first refusal. That contention, which mirrors the Fifth Circuit's holding, misconstrues the facts of *Martin* and fails to give effect to this Court's decision in that case.

The consent decree in *Martin* did not directly impair the rights of absent third persons; rather, the decree was relied upon by the signatory parties as authority for taking further action that impaired those rights. This Court held that absent third persons could not be indirectly bound in that manner: a consent decree may not be used as the justification for acts that impair the rights of absent third persons who could have been, but were not, joined in the litigation leading to the decree. It follows that the consent decree between the FTC and Enron cannot be used as the justification for acts impairing Valero's contractual right of first refusal. The Fifth Circuit's decision to the contrary is wrong under *Martin* and should be reversed.

Enron, unlike the FTC, argues that the consent decree had no effect, direct or indirect, on Valero's attempted exercise of its contractual right of first refusal. Enron Br. in Opp. 10. That argument is manifestly incorrect. The district court found as a fact that Enron included the requirement of FTC approval in its contract with Teco "to ensure compliance with the Consent Order" and held that "the FTC's order preempts Valero's contractual rights." Pet. App. 44a, 51a. The Fifth Circuit similarly reasoned that "Enron is bound by the consent decree to include that FTC approval term in any pur-

chase agreement," with the result that "Valero is bound . . . to accept that term." Pet. App. 30a. The consent decree plainly was relied upon by Enron, the FTC, and both courts below as the underlying justification for cutting off Valero's contractual right. That use of the consent decree was specifically barred by *Martin*.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

J. RUFUS WALLINGFORD
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Houston, Texas 77010-3095
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